92-269

NO. _____

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DELMUS G. GROSS,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether a person may lawfully be convicted of conspiracy to commit an offense against the United States by general jury verdict which permitted a finding of guilt based on non-criminal conduct?

B. Whether prior to October, 1986, since only financial institutions were required to comply with currency reporting requirements, individual bank customers had constitutional "fair warning" that "structuring" currency transactions to avoid a financial institution's reporting requirement could result in criminal liability?

C. Whether one indicted and tried for "structuring" currency transactions to cause a bank to knowingly fail to report the cash transaction is entitled to a jury instruction that only the bank, and not the individual, had any reporting obligations?

PARTIES TO THE PROCEEDING IN COURT OF APPEALS

The parties to the proceedings in the Court of Appeals were Petitioner, Delmus G. Gross, and United States of America. Insofar as Petitioner is aware, none of the parties has any parent or subsidiary company to report pursuant to Rule 29.1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

NO. _____

DELMUS G. GROSS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Delmus G. Gross, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered May 20, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is officially reported at ____ F. 2d ____ (1992 WL 104520 & 1992 U.S. App. Lexis 11285) and is reprinted in Appendix A.

JURISDICTION

The judgment sought to be reviewed was entered May 20, 1992. An order denying a petition for rehearing was entered July 7, 1992. This petition is filed within 90 days of that date. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in the U.S. District Court was an Indictment for violation of 31 U.S.C. 5311-5322, 18 U.S.C. § 2(b), and 18 U.S.C. § 371.

STATUTES INVOLVED

The following statutes are involved in this case:

(1) Relevant portions of the Currency Transaction Reporting Act, and specifically 31 U.S.C. 5313 and 5322, set forth in Appendix C;

(2) 18 U.S.C. § 2(b) (principal/agent liability), is set forth in Appendix D;

(3) 31 U.S.C. § 5324 (effective October 27, 1986), affirmatively prohibiting an individual from "structuring" a cash transaction to prevent the filing of a CTR, is set forth in Appendix E.

STATEMENT OF THE CASE

This is an Appeal from a Judgment entered on a jury verdict finding Petitioner, Delmus G. Gross, guilty of 16 substantive currency transaction violation counts, and a general conspiracy count. Petitioner was acquitted in the five week trial of a drug conspiracy count and two counts alleging transactions in criminally derived property.

The Sixth Circuit Court of Appeals reversed the Petitioner's convictions on 14 of the 15 substantive currency transaction violation counts, but affirmed his conviction on one substantive count, and on the conspiracy count.

Mr. Gross was a successful automobile dealer in Irvine, Estill County, Kentucky. One of his customers was Joseph A. Mohwish, who was ultimately to become a co-defendant in this criminal action. One of Mohwish's employees was Bill Patrick, who was apparently a cocaine dealer. According to the government's evidence, on two or three occasions, Mohwish delivered unspecified amounts of cash to Mr. Gross. Mr. Gross's automobile dealership records reflected receipts and disbursements from and to Mohwish. The disbursements were generally made in the form of cashier's checks in amounts less than $10,000. The last cash transaction alleged occurred in March, 1985. Mohwish testified as to the nature of a debtor/creditor relationship between himself and Gross.

The substantive counts of currency transaction violations concerning Mr. Gross involved allegations that Gross and Mohwish caused the Union Bank in Irvine, Kentucky, to fail to make the required currency transaction reports. The Sixth Circuit reversed Mr. Gross's conviction on Counts 14 and 16 through 30, since there was no evidence that the principal, the Union Bank, acted knowingly. (Slip Opinion at page 4).

The jury was instructed that Gross could be convicted of an 18 U.S.C. § 371 offense conspiracy if it found that any of the alleged offenses occurred. One of the offenses specified involved knowingly and willfully structuring or assisting in the

structuring of currency transactions in violation of 31 U.S.C. § 5324(3), *which statute was not effective until October, 1986, long after all the acts specified in the Indictment and included in the testimony had occurred.* The Court permitted the jury to return a general verdict on this issue and failed to require the jury to specifically find the offense involved or to limit the proof with respect to the purposes or offenses of the conspiracy, although same was requested by Mr. Gross.

The Sixth Circuit affirmed Mr. Gross's conviction on one substantive money laundering count on the basis that the principal, Union Bank, acted knowingly, and it further affirmed the general conspiracy conviction.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's judgment affirming Petitioner's conviction for an 18 U.S.C. § 371 offense conspiracy based on a general jury verdict which included an offense which was non-criminal at the time conflicts with applicable decisions of this Court.

Mr. Gross was convicted at trial of, and the Sixth Circuit affirmed, a conspiracy under 18 U.S.C. § 371, prohibiting conspiracy to "commit any offense against the United States. . . ." The Indictment charged a conspiracy to commit six specifically mentioned statutory offenses. The second offense alleged in the indictment and on which the Court included instructions was an allegation that Mr. Gross "knowingly and willfully structured and assisted in the structuring of currency transactions in violation of 31 U.S.C. § 5324(3)." As indicated above, this statute was not effective until October 1986. All of the evidence of cash transactions (other than Counts 31 and 32 for which Gross was acquitted), predated the effective date of this statute. As a consequence,

the inclusion of this particular offense leads to the possibility that Mr. Gross was convicted for conspiracy to commit this offense even though it was not affirmatively prohibited at the time alleged and upon which evidence was adduced.

Mr. Gross requested that the jury be required to specifically find the offense involved or that the Court limit the proof with respect to the purpose or offenses of the conspiracy, but the Court denied this request.

It is not a novel principle of constitutional law that a conviction of a defendant which is submitted to the jury on alternate theories cannot stand if any of the theories is improper. *Stromberg* v. *California*, 283 U.S. 359 (1931); *Leary* v. *U.S.*, 395 U.S. 6 (1969); and *Chiarella* v. *U.S.*, 445 U.S. 222, 237 (1980) ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for non-criminal conduct.").

These due process considerations have been a part of the fabric of the American Constitutional law for time out of mind. Indeed, in *Leary* v. *U.S.*, *supra*, the defendant's conviction was reversed since the jury was given alternate theories of criminal culpability, one of which was subsequently held unconstitutional, even though there was no contemporaneous objection to the instructions by the defendant at trial. It is a part of our notion of fundamental fairness that individuals not be "guessed" into the penitentiary. That possibility certainly exists since this jury might have determined that Mr. Gross violated 31 U.S.C. § 5324(3), which was not even in effect at the time he was alleged to have acted.

The Sixth Circuit did not rule on this particular argument even though it was invited to do so by Petition for Rehearing.

The Sixth Circuit's decision in this case disregarded this important constitutional principle. The petition should be granted to give effect to this safeguard which is such an important underpinning to American constitutional law.

II.

The Sixth Circuit's determination that constitutional fair warning that the currency transaction laws would be applied to a bank customer who "structured" a cash transaction, purportedly causing the bank to fail to report the transaction to the government, is in conflict with the decisions of the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits.

It is uncontradicted that at the time alleged and prior to October 1986, the currency reporting laws (31 U.S.C. §§ 5311 *et seq.*) did not establish criminal liability for the failure of an individual to file a currency transaction report. The Secretary of the Treasury was authorized to require filing by an individual, but the secretary only established regulations imposing such requirements on financial institutions. *U.S.* v. *Tobon-Builes*, 706 F. 2d 1092 (11th Cir. 1983); *U.S.* v. *Anzalone*, 766 F. 2d 676 (1st Cir. 1985); and 31 C.F.R. § 103.22a. 31 U.S.C. § 5324(3) was enacted effective October 1986, and for the first time affirmatively prohibited individuals from causing or attempting to cause a bank to fail to file a currency transaction report or from filing a false currency transaction report or from structuring transactions to avoid the reporting requirement. The Secretary of the Treasury subsequently amended the regulations accordingly.

The government's theory at trial was that Mr. Gross violated 18 U.S.C. § 2(b) by acting to cause the Union Bank to fail to comply with its duty in 31 U.S.C. § 5313 and the pertinent regulations to file a currency transaction report concerning a transaction involving more than $10,000 in cash. Mr. Gross was jointly indicted with Joseph Mohwish for aiding and abetting each other in the accomplishment of this result. The Sixth Circuit reversed Count 14 and Counts 16 through 30 since there was no evidence on these counts that the bank was aware of the "structured" nature of the transaction, so it had no duty to report. The Sixth Circuit's Opinion is based on a long line of cases from other circuits, including *U.S.* v. *Anzalone*, 766 F. 2d 676 (1st Cir. 1985); *U.S.* v. *Mur-*

phy, 809 F. 2d 1427 (9th Cir. 1987); *U.S.* v. *Varbel*, 780 F. 2d 758 (9th Cir. 1986); *U.S.* v. *Gimbel*, 830 F. 2d 621 (7th Cir. 1987); *U.S.* v. *Larson*, 796 F. 2d 244 (8th Cir. 1986); *U.S.* v. *Denemark*, 779 F. 2d 1559 (11th Cir. 1986); *U.S.* v. *Reinis*, 794 F. 2d 506 (9th Cir. 1986); *U.S.* v. *Dela Espirella*, 781 F. 2d 1432 (9th Cir. 1986); *U.S.* v. *Herron*, 825 F. 2d 50 (5th Cir. 1987); *U.S.* v. *Mastronardo*, 849 F. 2d 799 (11th Cir. 1988); *U.S.* v. *Bucey*, 876 F. 2d 1297 (7th Cir. 1989); *U.S.* v. *Risk*, 843 F. 2d 1059 (7th Cir. 1988); and *U.S.* v. *Bosch*, 914 F. 2d 1239 (9th Cir. 1990).

The basis for many of these holdings, and apparently that of the Sixth Circuit here, is that if the individual or entity caused to commit the crime (the Bank) was acting without knowledge, no crime was committed, because it then had no duty to report. *See U.S.* v. *Gimbel*, 830 F. 2d 621, 624 (7th Cir. 1987); *U.S.* v. *Varbel*, 780 F. 2d 758, 762 (9th Cir. 1986); and *U.S.* v. *Anzalone*, 766 F. 2d 676, 683 (1st Cir. 1985). Therefore an individual has no criminal liability for causing a bank to violate the currency transaction reporting act where the bank had no knowledge of the nature of the transaction, inasmuch as the bank then had no duty to report. *U.S.* v. *Reinis*, 794 F. 2d 506, 507 (9th Cir. 1986); and *U.S.* v. *Larson*, 796 F. 2d 244, 247 (8th Cir. 1986).

There is a line of cases from other circuits holding to the contrary and these are set out in Appendix F.

Mr. Gross also argued both at the trial court and the Sixth Circuit that application of the currency transaction requirements to him through the mechanism of 18 U.S.C. § 2(b) did not give him fair warning of the criminal nature of his conduct as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. The Sixth Circuit rejected this claim citing *U.S.* v. *Richeson*, 825 F. 2d 17 (4th Cir. 1987) (Slip Opinion at 4).

However, there are a number of circuits which hold to the contrary. In *U.S.* v. *Anzalone*, *supra*, the First Circuit ex-

haustively considered the issue and determined that the absence of any prohibition of individual "structured" transaction in the statute, its regulations, or the legislative history, meant that an individual had no duty not to structure, and prosecution for a structured transaction "violates the fair warning requirements of the due process clause of the Fifth Amendment." 766 F. 2d 681-682. *U.S.* v. *Varbel*, 780 F. 2d 758, 762 (9th Cir. 1985), followed *Anzalone* in holding that "the Reporting Act and its regulations did not impose a duty on appellants to inform the banks involved of the nature of their currency transaction. We believe that the application of criminal sanctions . . . here would violate due process."

U.S. v. *Mastronardo*, 849 F. 2d 799 (3rd Cir. 1988), is in accord. In this opinion, the Third Circuit reversed currency transaction violation convictions based on structuring transactions to avoid having the bank report to the government under 18 U.S.C. § 2(b), and 31 U.S.C. § 5311 *et seq.*, along with the accompanying treasury regulations. The Third Circuit held that "this statute and regulation did not give a reasonable bank customer fair notice that 'structuring' cash transactions to avoid the reporting requirements is criminal." 849 F. 2d at 804.

Likewise *U.S.* v. *Larson*, 796 F. 2d 244 (8th Cir. 1986), involved a number of separate transactions totalling over $53,000, with each cash transaction for slightly less than $10,000, committed by a single individual on one day. The Eighth Circuit noted that the First and Ninth Circuits (at that time) had determined due process prohibitions to individual, as opposed to financial institution, liability for structuring transaction requirements, *U.S.* v. *Anzalone*, *supra*, *U.S.* v. *Varbel*, *supra*, where other circuits were to the contrary. *U.S.* v. *Tobon-Builes*, 706 F. 2d 1092 (11th Cir. 1983); *U.S.* v. *Thompson*, 603 F. 2d 1200 (5th Cir. 1979); and *U.S.* v. *Cook*, 745 F. 2d 1311 (10th Cir. 1984). Irrespective of the split in authority, the Third Circuit in *Larson* held that

> Since the reporting act imposed no duty on Larson to disclose his conduct to the banks, we hold that Larson was not guilty of concealing information from the government. His due process rights were violated when criminal sanctions were imposed against him because he had no fair warning that his conduct was illegal.

796 F. 2d at 247.

U.S. v. *Denemark*, 779 F. 2d 1559 (11th Cir. 1986), involved a defendant who conducted fourteen separate cash transactions under $10,000 at fourteen different banks, to avoid the filing of currency transaction reports. The Eleventh Circuit reversed an individual's conviction, quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939): "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." 779 F. 2d 1563, quoting from 306 U.S. at 453.

Finally in *U.S.* v. *Bucey*, 876 F. 2d 1297 (7th Cir. 1989), an individual's conviction for causing the failure to file or causing the false filing of currency transaction reports was reversed due to the conclusion that there was no individual duty to file CTR's, and, as a consequence "to countenance the government's theory of prosecution imposing such a duty would deprive Bucey of his due process right to fair notice of the criminality of a failure to file. See *Kolender* v. *Lawson*, 461 U.S. 352 (1983)." 876 F. 2d at 1307.

This constitutional problem was apparently recognized by the United States Congress, because when it enacted the 1986 Money Laundering Act, one of the reasons for including 31 U.S.C. § 5324(3) was the recognition that the pre-1986 statutory scheme did not reach structured transactions. *See* S. Rep. 99-443, 99th Cong., 2d Session 3 (1986), pp. 3, 7. It was only in October, 1986, that Congress for the first time prohibited an individual's "structuring" as criminal conduct. 31 U.S.C. § 5324(3).

The Circuits are in disagreement as to the application of the money laundering laws to individuals prior to 1986. These opinions are set out in Appendix G. Not only do the Circuits disagree about the constitutionality of the application of money laundering laws to individuals prior to 1986, but the Seventh and Eleventh Circuits have held that, irrespective of the due process defense, the knowledge of the bank does not result in individual criminal liability. *U.S.* v. *Gimbel*, 830 F. 2d 621 (7th Cir. 1987); *U.S.* v. *Risk*, 843 F. 2d 1059 (7th Cir. 1988); and *U.S.* v. *Mastronardro*, 849 F. 2d 799 (11th Cir. 1988).

The matter was compounded in this case when the trial court refused to instruct the jury that Mr. Gross had no obligation to file a currency transaction report and the obligation to do so was that of the bank, although this instruction was requested by Gross. The jury came back three times with questions about this particular issue. Since this is a question of constitutional significance (*Anzalone*, *supra*), and since there is a split in the Circuits on this matter, it would seem to be incumbent on the Court to provide the jury with this crucial legal information. Such was not done at Mr. Gross's trial.

The petition should be granted so that this Court might give guidance to all circuits and district courts on this significant constitutional issue.

CONCLUSION

For the reasons set out above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 89-6410/6411/6412/6443/6444;
91-5075/5076/5243

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BILL J. PATRICK (89-6410/6443; 91-5075);
DELMUS G. GROSS (89-6411); JOSEPH A. MOHWISH
(89-6412/6444; 91-5076); KATHY MOHWISH (91-5243);
SUE BELL SHEETS (91-5243),
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky

Decided and Filed May 20, 1992

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge, delivered the opinion of the court, in which ENGEL, Senior Circuit Judge, joined. KENNEDY, Circuit Judge (App. p. 14a), delivered a separate concurring opinion.

SUHRHEINRICH, Circuit Judge. Joseph Mohwish and Bill Patrick ran a prosperous drug distribution and money laundering business. Delmus Gross's car dealership was used to launder the drug proceeds. It was Patrick's job to secure cocaine and marijuana and to locate buyers. Mohwish coordinatied the drug operation with Patrick and stored cocaine. Mohwish also owned a holding company for several of his other corporations, including a window manufacturing firm called Season Sash. Mohwish and Gross used these corporations on behalf of their money laundering activity.

Gross and Mohwish appeal convictions for acting as accomplices to violations of the Currency Transactions Reporting Act ("CTRA"), 31 U.S.C. §§ 5313, 5322. Gross, Mohwish, and Patrick appeal convictions for conspiracy to violate the CTRA. This same trio requests a new trial because of juror misconduct and an assortment of evidentiary and other errors. Mohwish and Patrick appeal convictions for operating a continuing criminal enterprise ("CCE"). Kathy Mohwish and Sue Bell Sheets challenge a forfeiture order entered pursuant to Joseph Mohwish's CCE conviction. We affirm in part, and reverse and remand in part.

I

Gross and Mohwish were convicted as accomplices for causing the Union Bank & Trust Co. to violate the CTRA. Federal regulations require financial institutions to file a currency transaction report for each cash transaction of more than $10,000. 31 CFR § 103.22(a). In addition, 31 U.SC. § 5322 makes it a criminal offense to knowingly violate section 103.22(a). The CTRA originally applied only to financial institutions.[1]

Gross and Mohwish used their respective businesses to prevent detection of drug sales to avoid the CTRA. Mohwish

[1] The CTRA has since been amended to encompass depositors. *See* 31 U.S.C. 5324.

periodically directed Season Sash's controller to make interest payments to Gross. Gross would then deposit these checks and return the funds to Mohwish, Patrick, or one of the companies under Mohwish's control.

Gross instructed his bookkeeper to put less than $10,000 on each deposit slip. The records show seventeen transactions in which Gross received a large cash payment from Mohwish or one of his companies. For each payment, there is an equivalent deposit into Gross's bank account and, shortly thereafter, a check issued to Mohwish, or an interest he controls, for an identical or similar amount.

As depositors, Gross and Mohwish could not be held directly liable for violating the CTRA. Instead, they were charged as accomplices under 18 U.S.C. § 2(b) for causing Union Bank & Trust to fail to file a currency transaction report. 31 U.S.C. § 5322.

A violation of sections 5313 and 5322 requires a knowing failure to report. Currency transactions are structured to prevent the financial institution from becoming aware of its reporting obligation. Consequently, the financial institution does not itself knowingly violate the reporting requirement and cannot be held criminally liable. Since the principal, the financial institution, did not commit a crime, the customer who structures transactions cannot be held criminally liable as an accomplice for aiding, abetting, or causing a crime. *United States* v. *Gimbel*, 830 F.2d 621, 624-26 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244, 246-47 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 507 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676, 682-83 (1st Cir. 1985).

However, accomplice liability exists where the financial institution or an employee has knowledge of the structuring, even though the knowledge is not held by an employee with responsibility for reporting. *See United States* v. *Hayes*, 827 F.2d 469, 472 (9th Cir. 1987). Union Bank & Trust vice-president David Maynard admitted accepting a "temporary" cash deposit of $100,000 without reporting it. Shortly after Maynard returned this money, Gross sent it back to the bank.

Gross directed Maynard to issue cashier's checks in this amount and to structrue the transaction to avoid the reporting requirement. Maynard complied although he knew it to be illegal.

Count 15 of the indictment charged Gross and Mohwish with causing the bank's failure to file a currency transaction report relating to this transaction. Because Union Bank & Trust acted knowingly, we affirm these convictions. We reverse the CTRA convictions brought under counts 14 and 16-30 because there is no evidence that the principal acted knowingly.

Mohwish and Gross claim that the law against structuring is unconstitutionally vague as applied to them. We join other circuits in rejecting this argument. *See, e.g., United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987).

Next we consider a challenge brought by Gross, Mohwish, and Patrick to their convictions, under count 13, for conspiracy to violate the CTRA. They allege insufficient evidence of agreement. It is well-settled that "[n]o formal or express agreement is required. The agreement may be inferred from the acts done in furtherance of the conspiracy." *United States* v. *Hitow*, 889 F.2d 1573, 1577 (6th Cir. 1989).

Ample evidence of agreement was presented against each defendant. Mohwish periodically stored Patrick's cocaine and managed his financial affairs. The facts show that Gross frequently laundered cash for Mohwish. Mohwish, in turn, paid Patrick as a Season Sash employee even though Patrick did no work for the company. Gross directed Maynard to process a cash transaction of $100,000 without filing a currency transaction report. This transaction was part of the money laundering operation, an essential element of the drug distribution enterprise. *See United States* v. *Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984). Therefore, we affirm the convictions of Patrick, Mohwish, and Gross for conspiracy to violate the CTRA.

Gross, Mohwish, and Patrick also assign error to the court's refusal to instruct the jury that they had no duty to file currency transaction reports. However, the court did inform the

jury of relevant statutory provisions placing the reporting requirement on the bank. The jury instructions clearly explained that the defendants could be convicted only if they conspired to cause the reporting requirement to be unfulfilled in violation of 31 U.S.C. § 5322. Under the circumstances, there is no reversible error. *See United States* v. *Townsend*, 796 F.2d 158, 163 (6th Cir. 1986).

II

Patrick and Mohwish appeal their CCE convictions. It is a crime to obtain substantial income by engaging in a continuing series of drug violations "in concert with five or more other persons" whom the defendant has organized, managed, or supervised. 21 U.S.C. § 848; *United States* v. *Davis*, 809 F.2d 1194, 1203 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987). Patrick and Mohwish deny organizing, managing, or supervising five other perons. The identity of the five persons chosen by the jury need not be unanimously agreed upon. *United States* v. *English*, 925 U.S. 154, 157-59 (6th Cir.), *cert. denied*, 111 S. Ct. 2810 (1991). However, there must be five persons who a jury could have found were organized, managed, or supervised by each defendant. *Davis*, 809 F.2d at 1204.

The first potential CCE scenario involves the extensive drug distribution operation of William Lawson. The evidence overwhelmingly proved that Patrick was one of Lawson's suppliers. But the mere existence of a buyer-seller relationship, without more, is insufficient to prove organization, management, or supervision. *See, e.g., English*, 925 F.2d at 157; *United States* v. *Butler*, 885 F.2d 195, 201 (4th Cir. 1989). There is no evidence of anything beyond a buyer-seller relationship between Patrick or Mohwish and Lawson. Neither Patrick nor Mohwish was involved in organizing Lawson's enterprise. They did not dictate Lawson's prices, customers, or territory. Thus, neither Patrick nor Mohwish organized, managed, or supervised Lawson or any of Lawson's underlings.

A second CCE scenario points to Kathy Mohwish. Kathy was acquitted of consipring to distribute drugs and launder money. One element of a CCE violation is that the defendant act "in concert with" the person organized, managed, or supervised. The phrase "in concert with" has been interpreted as requiring an agreement or conspiracy. *See United States* v. *Sinito*, 723 F. 2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *cf. Jeffers* v. *United States*, 432 U.S. 137, 148-50 (1977). Since Kathy was acquitted of conspiracy, neither Joseph Mohwish nor Bill Patrick could have acted in concert with her.

The government contends that Patrick's amd Mohwish's interactions with other parties also raise the CCE specter. For example, a building contractor named Raymond Butler took cash for work performed at Season Sash. Elmer Haas sold his Florida condominium to Mohwish and accepted a substantial part of the $170,000 purchase price in cash. Gross's bookkeeper, Jean Smith, complied with instructions to avoid making cash deposits over $10,000.

The prosecution presented no evidence that Butler, Haas, or Smith had any knowledge of either the drug distribution or the money laundering activity, much less that they agreed or conspired with Patrick or Mohwish. Butler, Haas, and Smith were at most "innocent dupes" whose conduct unwittingly advanced the illicit purposes of Patrick, Mohwish, and Gross. This falls short of acting "in concert with" under the CCE. *See Jeffers*, 432 U.S. at 148 n. 14.

Eduardo Ruiz also cannot be included. The jury might have inferred that Ruiz was somehow involved in the drug operation, given that Mohwish put him on the payroll of Production Leasing for $1,000 a week, although he would appear only sporadically. This, however, is not enough to satisfy the CCE. In addition to criminal conduct, the CCE involves a relational element: that of organization, management, or supervision. The record supplies no basis for an inference regarding such a relationship between Ruiz and Mohwish or Patrick. At best, the record supports an inference that Ruiz supplied drugs for the enterprise. A supplier is not ordinarily

organized, managed, or supervised by his customers. *See United States* v. *Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991).

A more persuasive CCE possibility concerns the activity of Kenny Patrick, Tommy Lancaster, and Greg Fender. Bill Patrick managed his son, Kenny. On at least one occasion, Kenny acted as a courier for his father by delivering the proceeds of a drug deal between Bill Patrick and Lawson. Kenny and two associates, Lancaster and Fender, also engaged in the distribution and sale of narcotics. Bill Patrick was acquitted of aiding and abetting this operation. His acquittal as an accomplice, however, does not preclude Patrick's CCE conviction as a manager, supervisor, or organizer of Kenny's operation because inconsistent jury verdicts may not form the basis for setting aside proper convictions on other counts. *United States* v. *Powell*, 469 U.S. 57 (1984).

Our task is to review the sufficiency of the evidence supporting the CCE convictions of Patrick and Mohwish without regard to Patrick's acquittal on the conspiracy charge. *Id.* at 67. The evidence indicated that Bill Patrick organized his son Kenny's delivery of drug money on one occasion. On another occasion, Kenny distributed "California cocaine" to Fender at the same time that his father allegedly acquired "California cocaine" from Lawson. Bill Patrick was present when Kenny and Lancaster packaged cocaine in the basement of his house and on one occasion when Kenny received payment from Fender. Viewing this evidence in the light most favorable to the prosecution, we conclude that the jury could infer that Bill Patrick organized Kenny. *See United States* v. *Adamo*, 742 F.2d 927, 933-34 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985).

It is well established that an organizer is not "necessarily able to control those whom he or she organizes." *United States* v. *Ray*, 731 F.2d 1361, 1367 (9th Cir. 1984). Rather, "an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise." *United States* v. *Apodaca*, 843 F.2d 421, 426 (10th Cir.), *cert. denied*, 448 U.S. 932 (1988). Here, Bill

Patrick controlled Kenny and observed Kenny and Lancaster packaging cocaine in his basement. This is sufficient evidence for the jury to infer that Bill Patrick organized Lancaster through his control over Kenny. "[A]n individual need not have direct communications with participants in order to be their supervisor. . . . If a defendant personally hires only the foreman, that defendant is still responsible for organizing the individuals hired by the foreman to work as the crew." *United States* v. *Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987).

Lastly, the jury could find that Patrick and Mohwish organized, managed, or supervised Delmus Gross and David Maynard,[2] and that Mohwish organized Patrick. Even if we accept that Patrick and Mohwish each organized, managed, or supervised Gross, Maynard, Kenny Patrick and Lancaster, this yields only four such persons for Patrick, too few to sustain a conviction under the CCE. We therefore reverse the CCE conviction of Bill Patrick.

Although the government contends that Patrick and Mohwish organized each other, the evidence indicates that it was Mohwish, who owned or controlled the corporations, supervised the money laundering, and received a larger share of the proceeds, who controlled Patrick. Counting Gross, Maynard, Bill Patrick, and through him, Kenny and Lancaster, Mohwish controlled five individuals. Accordingly, we affirm Mohwish's CCE conviction.

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[2] The CCE applies when parties act in concert to violate the narcotics laws. Gross and Maynard engaged in money laundering. Since this is an integral part of a drug enterprise, a jury is entitled to infer from such conduct a conspiracy to aid and abet the violation of the narcotics laws. *See United States* v. *Orozco-Prada*, 732 F.2d 1076, 1080-81 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984). Here, Gross was acquitted of conspiracy to violate the narcotics laws but convicted of money laundering. As noted above, however, we review the sufficiency of the evidence supporting inconsistent verdicts separately. *Powell*, 469 U.S. at 67. We find ample evidence to support the jury's finding that Gross's conduct was taken "in concert with" Mohwish's and Patrick's violation of the narcotics laws.

III

We next consider the third party challenge to the forfeiture order entered pursuant to Mohwish's CCE conviction. Under 21 U.S.C. § 853(n)(2), third parties must file a petition within thirty days of notice of the forfeiture order. Section 853(n)(4) directs that, if practicable, the hearing should be held within 30 days of the filing of the petition. Section 853(k) bars all intervention not taken pursuant to section 853(n). However, section 853(h) allows a third party to stay the forfeiture if proceeding with it would irreparably harm the petitioner.

The verdict against Gross, Mohwish, and Patrick was returned on August 24, 1989. On September 11, 1989, the court issued seizure warrants for the properties indicated in Counts 1 and 2 of the indictment. On September 28, 1989, Kathy Mohwish filed a Third Party Interest Petition to challenge the seizure. The next day, Sue Bell Sheets and Kathy Mohwish, as trustee for the Joseph Allen Mohwish II Trust, filed Third Party Interest Petitions. These petitions were also signed by Frank DeSalvo, attorney for Joseph Mohwish. A hearing on the petitions was scheduled for November 3, 1989. When the petitions of Mohwish and Sheets were called, DeSalvo withdrew the petitions on their behalf. On May 9, 1990, petitioners filed a motion to reinstate their third party petitions. The court denied these motions on January 29, 1991.

Petitioners argue that the government is estopped from proceeding with the forfeiture action. On August 28, 1989, attorney DeSalvo stated, "it's my understanding that an appeal would suspend any seizures until completion of that appeal and I want the record to reflect that we fully intend to appeal the verdict of the jury both as to guilt and particularly as to guilt of Count I and as to forfeiture." This statement does not support the petitioners' estoppel argument. Petitioners contend the November 3, withdrawal of their petition was made in the belief that the appeal stayed the forfeiture. Further, they contend that because neither the district court nor the

assistant U.S. attorney corrected this erroneous belief when DeSalvo expressed it, the government is estopped from proceeding with the forfeiture. The district court rejected this argument and refused to reinstate the petitions.

This finding can only be reversed if it was an abuse of discretion. *See United States* v. *One 1972 44' Striker, Bonanza*, 753 F.2d 867, 869 (11th Cir. 1985). The district court found that since the petitioners knew to file a petition within thirty days, they were aware that the petition was required to allow them to intervene in the action. This finding was not an abuse of discretion. Moreover, parties who assert estoppel must prove that their reliance was induced. *See* Restatement (Second) of Contracts § 90 (1979). There is no evidence of inducement here.

The Seventh Circuit has established a procedure for forfeiture cases where, due to procedural considerations, the trial court did not conduct a hearing on the merits. In such cases, the trial court is to conduct an independent review of its forfeiture order. *United States* v. *De Ortiz*, 910 F.2d 376, 384 (7th Cir. 1990). The court here conducted such a review and concluded that "these petitioners have no right to any interests in the properties." This finding is not clearly erroneous. *See United States* v. *Reckmeyer*, 836 F.2d 200, 204 (4th Cir. 1987).

Petitioners also wish to stay the forfeiture proceedings. 21 U.S.C. § 850(h) allows this if they can show that they would otherwise suffer irreparable harm, injury, or loss. The provisions of section 853(k), which bar intervention other than under section 853(n), do not apply to section 853(h) because section 853(h) only stays the forfeiture proceedings. However, there is no reason to stay the forfeiture proceedings here because we affirm Mohwish's CCE conviction and because we uphold the district court's finding that the petitioners have no valid claim to the forfeited property.

IV

Gross, Mohwish, and Patrick identify juror misconduct as the basis for challenging the denial of their motion for a new trial. Denials of a motion for new trial will be upheld absent abuse of discretion. *Budoff* v. *Holiday Inns, Inc.*, 732 F.2d 1523, 1525 (6th Cir. 1984). The defendants submit that juror Cunningham responded inappropriately to several questions posed to the venire panel, thereby withholding information the questions were designed to elicit. This allegedly led to a Sixth Amendment violation by depriving the defendants of the ability to exercise intelligently their peremptory challenges.

A prospective juror's failure to disclose material information is grounds for a new trial if it demonstrates bias. *McCoy* v. *Goldston*, 652 F.2d 654, 658-89 (6th Cir. 1981). If a juror is found to have deliberately concealed material information, bias may be inferred. If, however, information is not concealed deliberately, the movant must show actual bias. *Cunningham* v. *Sears, Roebuck & Co.*, 854 F.2d 914, 916 (6th Cir. 1988).

The venire panel was read a list of witness names and instructed to notify the court of any acquaintances on the list. Juror Cunningham did not respond when "James Dennis of Clay City" was read. After Dennis testified, Cunningham told another juror that he recognized him and that Dennis sold insurance. When asked why he did not respond during voir dire, Cunningham said he knew Dennis only as "James Ed Dennis". Acceptance of this reply was not an abuse of discretion. *See Cunningham*, 854 F.2d at 916.

The venire panel was also queried about any relatives or close friends in the law enforcement community. Cunningham failed to disclose that his brother was a deputy jailer and that he was a friend of a deceased former sheriff. Cunningham was unaware of a jailer's involvement with law enforcement. He thought his friendship with the former sheriff was mooted by the latter's death. On these facts it was no abuse of discretion to find that the failure to disclose was not deliberate.

The venire panel's knowledge of or familiarity with Delmus Gross was examined. Cunningham had no personal contact with Gross but knew that his brother had purchased a truck from Gross's car dealership. Cunningham was not required to report incidental family dealings of this kind.

Inquiries were made of the venire panel's dealings with or knowledge of Season Sash. Unbeknownst to Cunningham, his first cousin was employed by Season Sash. Cunningham testified that he was not aware of his cousin's employment with Season Sash until after the trial. This information could not have been concealed or of consequence to Cunningham's deliberations.

Finally, venire panel members were asked if any close relatives or friends had been a criminal defendant. Cunningham's brother was once charged with possession of gambling records and pled guilty to a misdemeanor. Cunningham first stated that he did not answer because the question asked for a felony, not a misdemeanor. When informed that the question referred to any criminal case, Cunningham responded that he did not think the question applied to a plea bargain. The decision to believe Cunningham does not constitute an abuse of discretion.

Since Cunningham did not deliberately conceal information, bias may not be inferred. For the defendants to receive a new trial, actual bias must be shown. The record discloses no sign of Cunningham's actual bias.

V

The defendants' remaining contentions need not detain us long. The defendants claim they were not told of the identity of several witnesses prior to trial. The denial of a bill of particulars lies within the discretion of the trial court. *United States* v. *Hawkins*, 661 F.2d 436, 452 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982). The indictment informed the defendants regarding the subject matter of the testimony and no prejudice resulted. *See United States* v. *Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985).

Patrick and Mohwish moved for severance after the admission of a statement made by Gross. The motion was denied and was not renewed at the close of the evidence. It was thereby waived. *United States* v. *Swift*, 809 F.2d 320, 323 (6th Cir. 1987).

Rebecca Johnson testified that her former husband described Patrick as "the big man.' Patrick described this as inadmissible hearsay. The record discloses no objection to either the question or the response. Thus, Patrick has failed to preserve this issue for appeal.

The *Brady* doctrine requires the prosecution to disclose material exculpatory evidence to a criminal defendant. *Brady* v. *Maryland*, 373 U.S. 83, 86-87 (1963). Patrick claims that the delay in disclosing the fraud conviction of government witness Carroll violated *Brady*. Delay only violates Brady when the delay itself causes prejudice. *United States* v. *Word*, 806 F.2d 658, 665 (6th Cir. 1986), *cert. denied*, 480 U.S. 922 (1987). Although Carroll's testimony hurt Patrick, no prejudice was proved.

The Jencks Act, 18 U.S.C. § 3500, requires the prosecution to supply the defense with any material statement made by a witness to the government that is signed or otherwise verified by the declarant. Patrick complains that statements made by witness Klein were not timely made available to him. The court offered to recall Klein for further cross examination when his Jencks statements were disclosed. There is no prejudice from a tardy Jencks disclosure if the court gives the defendant the opportunity, upon disclosure, to recall the witness for cross examination. *United States* v. *Valera*, 845 F.2d 923 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).

Patrick also alleges that FBI notes of various witness interviews were undisclosed. The notes were subsequently lost. There is no showing that the notes were verified or adopted by the witnesses and so their Jencks status is unclear. In addition, there is no evidence that the unavailability of these notes was the result of bad faith by the prosecution. *See United States* v. *Vella*, 562 F.2d 275, 276 (3d Cir. 1977) (although

the government should maintain such notes, there is no prejudice absent bad faith in failing to do so), *cert. denied*, 434 U.S. 1074 (1978).

VI

To sum up, the CCE conviction of Bill Patrick is reversed and remanded to the district court with instructions to vacate. The CTRA convictions of Delmus Gross and Joseph Mohwish brought under Counts 14 and 16-30 are reversed and remanded to the district court with instructions to vacate. We affirm in all other respects.

KENNEDY, Circuit Judge, concurring. I concur in the Court's opinion and write separately only because I would hold that the jury could include Ruiz as one of those organized and controlled by Joseph Mohwish.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 89-6411

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

DELMUS G. GROSS
Defendant-Appellant

ORDER
(Filed July 7, 1992)

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX C

31 U.S.C.

§ 5313. Reports on domestic coins and currency transactions

(a) When a *domestic financial institution* is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(B) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. . . .

(c)(1) *A person* (except a domestic financial institution designated under subsection (b) of this section) *required to file a report under this section shall file the report* —

(A) *with the institution involved in the transaction if the institution was designated;*
(B) *in the way the Secretary prescribes when the institution was not designated;* or
(C) with the Secretary.

(2) The Secretary shall prescribe —

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and
(B) the way the institution shall submit reports filed with it.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 996.)

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter [31 USCS § 5311 et seq.] or a regulation prescribed under this subchapter [31 USCS § 5311 et seq.] (except section 5315 of this title [31 USCS § 5315] or a regulation prescribed under section 5315 [31 USCS § 5315]) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter [31 USCS § 5311 et seq.] or a regulation prescribed under this subchapter [31 USC § 5315 et seq.] (except section 5315 of this title [31 USCS § 5315] or a regulation prescribed under section 5315 [31 USCS § 5315]), while violating another law of the United States or a part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title [31 USCS § 5318(2)] or a regulation prescribed under section 5318(2) [31 USCS § 5318(2)]), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 1000.)

APPENDIX D

18 U.S.C.

§ 2. Principals

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

APPENDIX E

31 U.S.C.

§ 5324. Structuring transactions to evade reporting requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction —

(1) cause or attempt to cause a domestic finanical institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic finanical institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Added Oct. 27, 1986, P.L. 99-570, Title I, Subtitle H, § 1354(a), 100 Stat. 3207-22.)

APPENDIX F

CIRCUIT COURTS OF APPEAL OPINIONS PERMITTING INDIVIDUAL CONVICTIONS FOR VIOLATIONS OF CURRENCY TRANSACTION LAWS

SECOND CIRCUIT

— *U.S.* v. *Heyman*, 794 F. 2d 788 (2nd Cir. 1986) (account executive structured customer's deposits)

— *U.S.* v. *Nersesian*, 824 F. 2d 1294 (2nd Cir. 1987) (combination of 18 U.S.C. §§ 1001 and 2(b))

THIRD CIRCUIT

— *U.S.* v. *American Investors of Pittsburgh, Inc.*, 879 F. 2d 1087 (3rd Cir. 1989) (customer indicted for aiding and abetting bank)

— *U.S.* v. *Donahue*, 885 F. 2d 45 (3rd Cir. 1989) (customer indicted for aiding and abetting bank officer)

FOURTH CIRCUIT

— *U.S.* v. *Richeson*, 825 F. 2d 17 (4th Cir. 1987)

FIFTH CIRCUIT

— *U.S.* v. *Thompson*, 603 F. 2d 1200 (5th Cir. 1979) (bank president)

SIXTH CIRCUIT

— *U.S.* v. *Gross*, ____ F. 2d ____ (6th Cir. 1992) (1992 WL 104520 & 1992 U.S. App. Lexis 11285)

EIGHTH CIRCUIT

— *U.S.* v. *Massa*, 740 F. 2d 629 (8th Cir. 1984) (18 U.S.C. § 1001)

— *U.S.* v. *Polychron*, 841 F. 2d 833 (8th Cir. 1988) (bank president)

— *U.S.* v. *Pilla*, 861 F. 2d 1078 (8th Cir. 1988) (bank advisor)

— *U.S.* v. *Shannon*, 836 F. 2d 1125 (8th Cir. 1988) (bank officer)

NINTH CIRCUIT

— *U.S.* v. *Hayes*, 827 F. 2d 469 (9th Cir. 1987) (§ 371 conviction only)

— *U.S.* v. *Segal*, 852 F. 2d 1152 (9th Cir. 1988) (complicity between Defendant and bank officer)

TENTH CIRCUIT

— *U.S.* v. *Cook*, 745 F. 2d 1311 (10th Cir. 1984) (false name case)

ELEVENTH CIRCUIT

— *U.S.* v. *Tobon-Builes*, 706 F. 2d 1092 (11th Cir. 1983) (§ 1001 case)

— *U.S.* v. *Puerto*, 730 F. 2d 627 (11th Cir. 1984) (false name case; § 1001)

— *U.S.* v. *Sans*, 731 F. 2d 1521 (11th Cir. 1984)

— *U.S.* v. *Gineola*, 783 F. 2d 1549 (11th Cir. 1986) (§ 371 case)

— *U.S.* v. *Lafaurie*, 833 F. 2d 1468 (11th Cir. 1987) (§ 371)

— *U.S.* v. *Meros*, 860 F. 2d 1304 (11th Cir. 1989)

APPENDIX G

CIRCUIT COURT OF APPEAL CASES HOLDING NO FAIR WARNING THAT "STRUCTURED" TRANSACTION CRIMINAL

FIRST CIRCUIT
— *U.S.* v. *Anzalone*, 766 F. 2d 676 (1st Cir. 1985)

THIRD CIRCUIT
— *U.S.* v. *Mastronardo*, 849 F. 2d 799 (3rd Cir. 1988)

SEVENTH CIRCUIT
— *U.S.* v. *Bucey*, 876 F. 2d 1297 (7th Cir. 1989)

EIGHTH CIRCUIT
— *U.S.* v. *Larson*, 796 F. 2d 244 (8th Cir. 1986)

NINTH CIRCUIT
— *U.S.* v. *Varbel*, 780 F. 2d 758 (9th Cir. 1986)

ELEVENTH CIRCUIT
— *U.S.* v. *Denemark*, 779 F. 2d 1559 (11th Cir. 1986)

CIRCUIT COURTS OF APPEAL FINDING NO CONSTITUTIONAL IMPEDIMENT TO CONVICTION OF INDIVIDUALS FOR "STRUCTURING" CURRENCY TRANSACTIONS

SECOND CIRCUIT
— *U.S.* v. *Heyman*, 794 F. 2d 788 (2nd Cir. 1986)

FOURTH CIRCUIT
— *U.S.* v. *Richeson*, 825 F. 2d 17 (4th Cir. 1987)

SIXTH CIRCUIT
— *U.S.* v. *Gross*, ____ F. 2d ____ (6th Cir. 1992) (1992 WL 104520 & 1992 U.S. App. Lexis 11285)

TENTH CIRCUIT
— *U.S.* v. *Cook*, 745 F. 2d 1311 (10th Cir. 1984)